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IN THE

# Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
*Petitioner,*

v.

STATE OF WASHINGTON
*Respondent.*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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## PART I:

### Opinions of the State Courts

IN JUSTICE COURT, RICHLAND PRECINCT,
BENTON COUNTY WASHINGTON,
BEFORE HON. ALBERT J. YENCOPAL,
JUSTICE OF THE PEACE

| | |
|---|---|
| STATE OF WASHINGTON, *Plaintiff*, v. WILLIAM RABE, *Defendant*. | No. 2109 ORDER DENYING MOTION TO SUPPRESS September 27, 1968 |

Let me clarify from the outset some matters that were considered true or representations made as though they were accurate. I believe that counsel for the defense said that Delaware is the only state that still had a censorship board. This is not true. It is just across the state line—Maryland. Also, some representation was made that the movie passed the censorship board in that state. That is partially true. However, portions of the film were cut by the censorship board. These cuts were made with the consent of the distributor. Specifically, the scene depicting an alleged close-up of Carmen and Baby Lucas embracing through colored glasses was cut. This movie was shown in Chicago under an "Adults Only" advertisement, and thus did not come within the purview of the Chicago Review Board. It was not shown in the City of Detroit, which also has a review board. Gentlemen, I have correspondence to that effect if you wish to examine the same.

Now, to get to the crux of this hearing—the defendant's motion to dismiss the charge or to suppress the evidence. Sgt. Gordon testified under oath at a hearing specifically held in the court room, and a part of which was trans-

cribed, about the movie. In addition to the portions contained in the transcript, he also testified about two other scenes—one in which the girl made contact with a bottle of pop and also the scene of two people apparently having intercourse as seen through colored glasses. He further testified that the whole movie was filth, and that he would not take his wife to see it. I have notified the defendant's counsel of the other scenes to which Sgt. Gordon had testified so that he has not heard them for the first time. Even though I followed the procedures formulated by the Supreme Court, I was not aware of them at the time I did this. I did this on my own initiative—so as not to consider lightly charges made involving matters normally guaranteed under the free speech amendment. I did judicially scrutinize the complainant about the movie before I issued the warrant. I did this in light of determining if there was probable cause to make an arrest for showing an obscene movie—obscene as defined by the Supreme Court in *Roth vs. United States,* 354 U.S. 476; 77 Sup.Ct. 1304; 1 L.Ed. (2d) 1498. The defendant interprets the guidelines as set forth in *Marcus vs. Search Warrants of Property at* 104 *East* 10*th St.,* 367 U.S. 717; 81 Sup.Ct. 1708; 6 L.Ed. (2d) 1127, specifically that the judge must make inquiry "designed to focus searchingly on the question of obscenity", as meaning that I must determine beyond a reasonable doubt at that hearing the movie was obscene. This is not true. The 4th Amendment to the United States Constitution regarding unreasonable search and seizure asserts that the people will have the right to be secure in their persons and property, and that no warrant will issue but on probable cause. The question of whether the quantum of proof required to issue a warrant on probable cause is the same as that necessary to es-

tablish guilt was clearly answered in the negative in the cases of *Brinegar vs. U.S.*, 338 U.S. 160; 69 Sup.Ct. 1302; 93 L.Ed. 1878; and *Draper vs. U.S.*, 358 U.S. 307; 79 Sup.Ct. 329; 3 L.Ed. (2d) 327; I quote from the Draper case.

> "That emphasis (guilt and probable cause as one) we think, goes much too far in confusing and disregarding the difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search. It approaches requiring (if it does not in practical effect require) proof sufficient to establish guilt in order to substantiate the existence of probable cause. There is a large difference between the two things to be proved (guilt and probable cause) as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof to establish them."

The purpose of the probable cause hearing was a procedure designed to focus searchingly on the question of obscenity. Now, I think that the Supreme Court is not playing games with us and now will enter into the field of saying that it shall also review whether, under all of the facts, I had made a proper judgment in saying probable cause existed. This is why the emphasis is on procedure.

I have read all of the cases submitted to me in the briefs of the parties. Let me compliment both parties who are taking the legal questions posed herein very seriously.

The case of *A Quantity of Books vs. Kansas*, 378 U.S. 205, struck down a statutory scheme which would amount to prior restraint of books. This differs from the case at bar considerably. Here, there is no prior sweeping restraint. An arrest was made on a warrant issued on prob-

able cause. The film was seized as evidence indicental to the arrest. Furthermore, the Supreme Court had a clear opportunity to pass on the question of whether an adversary hearing is necessary prior to the seizure of film. I speak of the case of *Lee Art Theatre, Inc. vs. Virginia,* 20 L.Ed. (2d) 1313. They chose to ignore the question. I fully realize the ruling of the case of *Metzger vs. Pearcy,* 393 F. (2d) 202, but I do not interpret the *Quantity of Books* case as did that Court. That opinion is not binding on this Court. I must deny the motion.

DONE By the Court this 27th day of September, 1968.

/s/ ALBERT J. YENCOPAL
*Justice of the Peace*

IN JUSTICE COURT, RICHLAND PRECINCT,
BENTON COUNTY, WASHINGTON,
BEFORE HON. ALBERT J. YENCOPAL,
JUSTICE OF THE PEACE

| | |
|---|---|
| STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.* | No. 2109 DECISION October 7, 1968 |

I have read the following United States Supreme Court cases to-wit: *Beauharnair* [sic] *v. People of State of Illinois,* 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed 919, which upheld a conviction of libel; *Near v. State of Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed 1357, which overturned a conviction against a newspaper; *Roth v. U.S.,* 354 U.S. 476, 1 L.Ed(2d) 1498, 77 S.Ct. 1304, which upheld a conviction of Roth who used the mails to distribute obscene writings and also set up the present test of obscenity; *Court in Grove Press Inc.* [sic] *v. Gerstein,* 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed(2d) 1035, a 5 to 4 decision reversing a Florida State decision declaring Henry Miller's book "Tropic of Cancer" to be obscene; *Jacobellis v. Ohio,* 378 U.S. 184, 12 L.Ed(2d) 783, 84 S.Ct. 1676, in which the contemporary community standard was stated to be on a national scale, and that a portrayal of sex is not utterly without redeeming social value if the material deals with sex in a manner that advocates ideas, or has literary or scientific or artistic value or any other form of social importance; *Kingsley Books v. Brown,* 354 U.S. 437, 1 L.Ed (2d) 1469, wherein the Court upheld a New York statute dealing with obscene literature; *Kingsley International*

*Pictures Corp. v. Regents of Univeristy of State of New York*, 360 U.S. 684, 3 L.Ed(2d) 1512, 79 S.Ct. 1362, which struck down, as being unconstitutional, a New York statute which prohibited the showing of acts of sexual immorality as desirable—the case involving a movie made from D. H. Laurence's "Lady Chatterly's Lover"; *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, which permitted the showing of the movie "The Miracle"; *A Book v. Attorney General*, 383 U.S. 413, 16 L.Ed(2d) 1, 86 S.Ct. 975, which declared the book commonly known as "Fanny Hill" not to be obscene; *Ginzburg v. U.S.*, 383, U.S. 463, 16 L.Ed(2d) 31, 86 S.Ct. 942, which upheld the conviction of Ginzburg for selling obscene literature; *Manual Enterprizes Inc. v. Day*, 370 U.S. 478, 8 L.Ed(2d) 639, 82 S.Ct. 1432, which declared that publications that may arouse the sexual interest of homosexuals falls short of arousing the interest of the average person, and thus not obscene; *Times Film Corporation v. Chicago*, 365 U.S. 43, 5 L.Ed (2d) 403, 81 S.Ct. 391, which upheld prior censorship of movies; *Teitel Film Corporation v. Cusah*, 19 L.Ed(2d) 966, declared the Chicago ordinance unconstitutional because it failed to guarantee a speedy judicial determination on movies subjected to prior restraint, and *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed. 649, 85 S.Ct. 735, upon which case the Teitel decision was predicated. In addition, I found the annotations in 5 ALR(3d) 1158 and 11 ALR (3d) 1276, as well as the book entitled "Movies, Censorship and the Law," written by Ira H. Carmen, to be very helpful. Through the good offices of the Clerk of the Washington State Supreme Court, I received a copy of a decision filed September 26, 1968, entitled *Fine Arts Guild, Inc. v. The City of Seattle, et al*, which struck down the

licensing procedures established by the City of Seattle with respect to the classification of movies. In short, the Court said it was a prior restraint without judicial determination.

It is clear from these cases that the majority of the Judges of the U.S. Supreme Court, (and this is a fluid and slim majority) that [sic] obscenity is defined as follows: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. As stated in the case of *A Book v. Attorney General,* cited above,

> "Under this definition, as elaborated in the subsequent cases, three elements must coalesce; it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interests in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

None of the above criterial [sic] can be properly applied unless first, there is some relationship established between the average person and a prurient interest in sex, the average person and the contemporary community standards, the average person and redeeming social values.

In the main, the average person is an integrated part of the family structure. There are exceptions, but we are concerned with the average person. Traditionally and historically, the families have joined together at some personal sacrifice to establish and preserve an orderly community.

The term community therefore, describes the bringing together of families with common purposes and interests—for the provision of law and order, services, schools and

facilities for their convenience, protection and preservation. Within any community there are individuals, and certainly the family is made up of individuals. Each individual has the right to exercise rights within the framework of the community, but the basic cornerstone of a community, and in fact of a democracy is the family unit. If it were not for the family and the mutual responsibilities of the members of the family to itself and to the community, and vice versa, democracy would give way to social anarchy. Speaking conversly, if the overriding purpose of society was solely for the benefit of the individual directly, rather than to his benefit and security through the family, certainly the laws and institutions we now have would be grossly different in makeup and character. However, our laws and institutions are aimed at meeting the family or community interests and needs, and through this framework, then, the rights and needs of the individuals are secured. It is in this light that the average person would view his relationship to the community.

Whether a particular act or expression is within the purview of a community standard would be determined by whether such act or expression will definitely be an asset toward preserving the family unit or have an adverse effect upon it. The area between these two view points may, at times be clouded, but it is discernible.

In this makeup, we have imposed many forms of restrictions upon our right of public expression because the existence of our democratic structure demands it.

We have laws which prohibit the right to use words which libel or slander someone—the ultimate good to society from this limitation is that men and women should

not be lowered in esteem or should not be shunned by their social community.

In the case of perjury, personal advocacy must be subordinate to the truth and or realism or an ascertainable fact. The law of perjury demands we limit our words to the truth or to a knowledgeable fact. Because of this limtiation of free expression, society benefits. We submit our differences to be settled, through established legislative and judicial procedures rather than through individual determination.

A very recent expression by the peoples legislatives [sic] has been the truth in lending and the truth in packaging bill, which established uniformity and conformity in product and fine print subtitles, that intentionally or otherwise have tended to be misleading to this nation of communities.

Clear examples of protection afforded to the public and community have been cited, but as an additional clear and concise example of protecting the established community standard is Richland Municipal Code 9.04.030, which prohibits the use of vulgar, obscene or immoral language in public. Similar ordinances appear in the lawbooks of virtually every community in the nation.

Finally, we have the particular state statute in question which prohibits the showing of an obscene movie.

All of these are limitations upon free expression of speech. They have one thing in common—namely that the utterance is directed at a state of mind or contributing to a state of mind. The average person seeks to limit these public expressions because they detract from and destroy a community accepted notion or action. It is not the terminology of itself that is bad, but rather what impression

that terminology conveys to the mind of the audience. For we act as we are taught and lead [sic] to think.

It is in this vein, then, that we look at the average person and his attitude toward a particular material that has sex connotations—having a realization of his relationship to the community and a realization that the community must be preserved. Thus, he feels concern for his children and their relationships with others in the community and rightfully doubts the contribution of this material to the families' established mores or to the beneficial edification, education or enlightenment of the offspring toward accepting a responsible future role in the community.

Clearly a marriage and the family is the basic unit of society. And within the context of the marriage, sex is a normal and integral part of it. But the average person does not condone the performance of any sex expression in the public park or on the front lawn. To do so is an affront to his neighbors. Adultery is not a way of life. Nor is lesbianism, homosexuality nor sodomy. In fact, these are considered as crimes, whether committed publicly or privately. These are considered as perversions.

The average person would not teach these sexual abberations to his children. Nor would he approve of such education or encouragement by the clergy or school. These acts not only constitute a contradiction to the established social pattern of marriage and family, but distort and degrade the historical, traditional and anticipated furtherance of our communities which since the beginning of recorded time has been based upon family and community relationships.

There are gradations of tolerance of sexual discussion and exposure within the community. But this depends upon the nature of the subject, the selectivity of the audience, the manner of expression and the location at which it transpires. The book "Fanny Hill" may appear on the shelf of any supermarket. Yet, in that same supermarket, its most sensual portrayal of a sex scene depicted could not be displayed to promote the sale of the book. There have been court cases involving books and movies but the sections of the books and scenes in the movies that have been alleged to be obscene and offensive have not been vividly or graphically portrayed on the radio, nor upon a television network nor pictorally or verbally appearing in the newspapers across the land. The reason for this appears to buttress the courts [sic] contention, that these daily forms of public communication that go into the house and school have not in the past and, for reasons of community representation and concern, would not become a vehicle for this type of material to the community interest and morals they reflect and serve. Additionally, this same principle applies to the billboard advertising. And without question, one would not expect to find representations of scenes portraying sex as appeared in the movie "The Fox" upon a billboard along the highway and open to view by occupants of school buses or vehicles passing by carrying families of this or any other community.

There comes a time, however, wherein the balance of community attitudes toward philosophies versus a community attitude toward its own well-being is reached. At the point that the self-established community becomes concerned about the public exposures that are contrary to its life and teachings, then the commuity and its families

must act out of self preservation. If, indeed, a community has cause to believe that a particular material can either prompt, promote or suggest condonment [sic] of certain actions that are offensive or contrary to either established law or accepted standards, or has cause to believe that such acts are in fact occurring, then, most assuredly, the same community has the right, indeed, the obligation to initiate the necessary action. Such a view is in keeping with the position taken by Justice Douglas and Justice Black,—that freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action, as to be an inseparable part of it.

In review, therefore, we take the Roth test, point for point as seen by the average person—who is part of a family structure and views things in that light. First, the dominant theme must be sex,—that is, there must be a saturation of sex. Secondly, although it may be offensive to some, bold to others, he must view it as being patently offensive to the average person in the community,—to the average member of the family. He must view it nationwide in this light. Third, this saturation of sex, even though patently offensive to the average person in the community, must have some justification for its existence—however slight—but it must have redeeming value to the social structure.

Should the saturation of sex, being the dominant theme, be patently offensive to contemporary standards and there is cause to believe to the average person that it will erode his society—erode his marriage, then there must be a further finding that it does not have some social value. If found to erode society, it would be difficult to say, at the same time, that it contributes to it. Whether there is cause to believe that such actions—the exposure of sex contrary

and affronting to community standards will destroy the community—is for the legislature and not the courts to determine. Those who do not believe so should seek an amendment to the law or its abolishment in the legislature. The statute in question is the product of thinking that a saturation of sex could destroy the community. The legislature prescribed the court at this level to determine the danger to the existence of the community. And having established this court of this level rather than those of other jurisdiction is well founded [sic], because of our direct and daily contact with the moral fiber of the community. Thus, the average person has delegated to this court whether some expression should be permitted or should be suppressed.

This court, therefore, views the movie in accordance with the test set forth by the Supreme Court—namely through the average man in the community of the United States, who, for the most part is a family head—and one who seeks to perpetuate the community he has created.

(1) I find that the movie Carmen Baby has as its main theme—its dominant theme—a prurient interest in sex. Here is why I say that. Look at the numerous sex scenes. First the fondling of the breast, the fondling of the policeman's genitals, the naked [man] and woman in bed, and not husband and wife, the lengthy vivid and precise portrayal of every move—and from close up of the sex scene in bed when Carmen orally copulated the policeman and then a later scene when he did the same to her . . . the dance around the bottle wherein she masterbated [sic] herself . . . . the lesbian scene with the wife of the parole board officer . . . : all in fine and minute and closeup detail . . . and the act of sex intercourse which was taken through colored

glasses and took about five minutes to portray . . . and numerous other short scenes. The non-sex plot, about 15 minutes in duration, was the fight of the woman, the chase, the scenes at the police station, the entrance of Baby Lucas, and the killing of Carmen.

(2) The movie was an affront to contemporary community standards and patently so. The average person would not tolerate any of these being displayed outdoors, so that it invades the homes of the surrounding residents and can be seen from the highway. The average person seems to still rule this country. I judge his standards by the books he buys, the movies he sees or the records he purchases over a period of time. The Bible is the best seller by far. "Sound of Music" has the largest box office movie attraction, but this is second to "Gone with the Wind." And "White Christmas" is the best record seller. The various closeups [sic] shots of sex perversion and of acts that normally are private and in marriage certainly, is patently offensive to the average person—who is normally the family head.

(3) The average person would be hardpressed to find any redeeming social value. It must give some betterment to the social structure. Some testified that it was a replay of the original plot of "Carmen." I believe that the average person would find this portrayal to profane both the original story of Carmen or the opera Carmen. It has not redeeming social value.

I find the defendant guilty.

DONE By The Court this 7 day of October, 1968.

/s/ ALBERT J. YENCOPAL
*Justice of the Peace*

BENTON COUNTY
Office of County Clerk and
Clerk of Superior Court
FILED
Sep 22, 1969
LAURA BRADER, Clerk
By *Sue Bishop*, Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

THE STATE OF WASHINGTON, *Plaintiff*,

v.

WILLIAM RABE, *Defendant*.

No. 3123

FINDINGS OF FACT AND CONCLUSIONS OF LAW

September 22, 1969

This matter having come on regularly to be heard on the 2nd day of April, 1969, the plaintiff being represented by Curtis Ludwig and Richard Bennett, Deputy Prosecuting Attorneys, and the defendant appearing and being represented by his attorney, Rembert Ryals; and evidence and argument of counsel having been heard and good cause appearing therefore, the Court makes the following:

## FINDINGS OF FACT

### I

That on August 25, 1968 through August 29, 1968, the motion picture film "Carmen Baby" was exhibited at the Park-Y Drive In Theatre in Richland, Benton County, Washington, which was managed by the defendant, William Rabe.

II

That said Park-Y Drive In Theatre faces a residential area of the City of Richland and an overpass providing a clear view of the screen to residents of the area and passing motorists.

III

That individual portions or scenes of the movie have a dominant theme which appeals to a prurient interest in sex, is patently offensive because it confronts contemporary community standards relating to the representation of sexual matters and is utterly without redeeming social value.

IV

That passing motorists and residents outside the theatre are in a position to see only individual portions or scenes of the movie.

From the foregoing Findings of Fact the court makes the following:

## CONCLUSIONS OF LAW

I

That the Court has jurisdiction of the defendant and the subject matter herein.

II

Individual portions or scenes of the movie "Carmen Baby" are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves.

III

That the defendant, William Rabe, is guilty of exhibiting an obscene movie and judgment and sentence should be entered accordingly.

DONE IN OPEN COURT this 14 day of Steptember, 1969.

/s/ JAMES J. LAWLESS
*Judge*

Presented by:
/s/ CURTIS LUDWIG
CURTIS LUDWIG, Deputy
Prosecuting Attorney

BENTON COUNTY
Office of County Clerk and
Ex-Officio Clerk of Superior Court
Filed for Record Sept. 22, 1969
LAURA BRADER, Clerk
By *Sue Bishop*, Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

THE STATE OF WASHINGTON,
*Plaintiff,*

v.

WILLIAM RABE,
*Defendant.*

No. 3123
JUDGMENT
September 22, 1969
EXECUTION DOCKET
Vol. 14 Page 449

The defendant, William Rabe, having been charged with the crime of Obscenity committed on the 29th day of August, 1968, trial having been held on the 2nd day of April, 1969, and the Court having made and entered Findings of Fact and Conclusions of Law, NOW, THEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED that the said defendant, William Rabe, is guilty of the crime of Obscenity and that he be punished by being fined the sum of Six Hundred ($600.00) Dollars, and to pay the costs of this prosecution as the same may be hereinafter taxed.

DONE IN OPEN COURT this 19 day of September, 1969.

/s/ JAMES J. LAWLESS
*Judge*

Presented by:
/s/ CURTIS LUDWIG, Deputy
Prosecuting Attorney
Benton County, Washington

FILE
In Clerks Office
Supreme Court, State of Washington
Date 5/6/71
/s/ ORRIS L. HAMILTON
*Chief Justice*

# IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

*Respondent,*

v.

J. WILLIAM RABE,

*Appellant.*

[1] Obscenity—Seizure—Prior Adversary Hearing—Motion Picture. An adversary hearing prior to seizure of a single allegedly obscene motion picture is not required; however, the proceeding in obtaining the search or arrest warrant must be "designed to focus searchingly on the question of obscenity" when investigating the facts contituting the basis of the warrant, so as to avoid indiscriminate suppression of challenged material.

[2] Obscenity—Motion Picture—Partial Obscenity. Under proper circumstances movies which are obscene only in part may be constitutionally suppressed under state obscenity laws (RCW 9.68.010).

[3] Obscenity—Tests for Obscenity—Contextual Test—Motion Pictures. Although a motion picture or other publication might not be strictly obscene as appealing to a prurient interest, affronting contemporary community standards, and being utterly without redeeming social value, material can still be found to be obscene when examined under a contextual or variable test. In close cases, under the contextual test, the courts can consider the circumstances of production, sales, and distribution of the allegedly obscene material.

[4] Obscenity—Tests for Obscenity—Contextual Test—

Outdoor Theater. The display of a lewd and offensive film at an outdoor theater, which film fails to strictly meet the initial tests for obsenity, has the effect of repeatedly and unwillingly violating the right of privacy of residents of nearby homes to whom the pictures on the screen were clearly visible, and constitutes suppressible obscene material under RCW 9.68.010.

Finley, Hunter, Hale, and Neill, JJ., concur by separate opinion.

Appeal from a judgment of the Superior Court for Benton County, No. 3123, James J. Lawless, J., entered September 22, 1969. *Affirmed.*

Prosecution for exhibiting an obscene motion picture film. Defendant appeals from a conviction and sentence.

FILE
In Clerks Office
Supreme Court, State of Washington
Date 5/6/71
/s/ ORRIS L. HAMILTON
*Chief Justice*

# IN THE SUPREME COURT OF THE STATE OF WASHINGTON

| | |
|---|---|
| THE STATE OF WASHINGTON, *Respondent,* v. WILLIAM RABE, *Appellant.* | No. 41365 En Banc Filed May 6, 1971 |

McGOVERN, J.—This is an appeal from a judgment entered upon the defendant's conviction of the crime of exhibiting an obscene motion picture film in violation of RCW 9.68.010.

Defendant managed an outdoor drive-in theater in the City of Richland. At the time of his arrest, he was exhibiting the motion picture "Carmen Baby" and had imposed no age restriction upon the paying audience. The picture screen of the outdoor theater was situated in such a way that it faced 12 to 15 adjoining family residences and a portion of a nearby major highway. Pictures upon the screen were thus visible to residents of those homes and their guests, to passing motorists upon the highway, and to those persons who would look at the screen from just outside the chain-link retaining fence enclosing the theater grounds.

August 28, 1968, a Richland police officer stood outside the theater fence and observed a portion of the film being

shown. The following night, from the same vantage point, the officer and the Richland city attorney viewed almost the entire film. On both occasions, teenage and younger children were observed by the officer to be watcing the motion picture from various points outside the theater fence.

Thereafter, the complaining officer appeared before a Richland justice of the peace and testified that he had observed the motion picture. He described some of the more objectionable scenes of the movie and informed the magistrate that teenage and pre-teenage children were viewing the picture from the periphery of the theater enclosure. Upon formal written complaint, a warrant for the arrest of the defendant was then issued and executed. As an incident to the arrest, and for evidentiary purposes, two reels of film of "Carmen Baby" were seized by the arresting officers.

October 3, 1968, defendant was convicted in the Richland District Justice Court of "wrongfully and unlawfully caus[ing] to be exhibited an obscene, indecent and immoral show" contrary to RCW 9.68.010.[1] He thereupon appealed to the Benton County Superior Court where following a trial de novo, he was again found guilty of the charge. The superior court did not conclude that the pic-

1. RCW 9.68.010 then provided:

"Every person who—

"(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or

"(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;

"Shall be guilty of a gross misdemeanor."

ture was obscene in its entirety, but rather that "Individual portions or scenes of the movie . . . are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves." It therefore concluded that the defendant was guilty of exhibiting an obscene movie and entered judgment accordingly.

On this appeal, defendant first argues that the seizure of the motion picture film for evidentiary purposes without a prior *adversary* hearing on the question of its obscenity constituted a prior restraint on his First Amendment right to freedom of speech. He contends that the rule announced in *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1968), is applicable here and that it requires a reversal of his conviction for the reason that the improperly seized film should not have been admitted in evidence against him. In *Metzger*, the court said, at page 204:

> The lesson of *Books* is that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. Such a seizure violates the First Amendment to the Constitution of the United States, and is a prior restrant condemned by the Supreme Court. In light of *Burstyn*, supra, *Kingsley Pictures*, supra and *Jacobellis*, supra these rules apply to motion pictures as well. Allegedly obscene publications or movies are not to be treated the same way as narcotics, gambling paraphernalia and other contraband.

Although numerous federal district and circuit courts have recently adopted the viewpoint that a prior adversary hearing must be afforded before an allegedly obscene motion picture may be constitutionally impounded (*Metzger v. Pearcy, supra; Astro Cinema Corp., Inc. v. Mackell*, 442 F.2d 293 (2d Cir. 1970); *Demich, Inc. v. Ferdon*, 426 F.2d

643 (9th Cir. 1970); *Cambist Films, Inc. v. Duggan*, 420 F.2d 687 (3d Cir. 1969); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2d Cir. 1969); *Bongiovanni v. Hogan*, 309 F. Supp. 1364 (S.D. N.Y. 1970); *Carroll v. Orlando*, 311 F.Supp. 967 (M.D. Fla. 1970); *Natali v. Municipal Court of San Francisco*, 309 F. Supp. 192 (N.D. Cal. 1969) and cases cited therein), we, unlike those courts, are not persuaded that our nation's highest court requires an *adversary* hearing in every case before a film may be seized as evidence of an obscenity law violation.

The three decisions of the United States Supreme Court which consider in particular the question of whether a prior adversary hearing is constitutionally required are *Marcus v. Search Warrant of Property*, 367 U.S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708 (1961), *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L. Ed. 2d 809, 84 S. Ct. 1723 (1964) and *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 20 L. Ed. 2d 1313, 88 S. Ct. 2103 (1968).

In *Marcus*, the court found improper the seizure of approximately 11,000 copies of 280 different publications considered by the police to be obscene items. The officers were acting under a general warrant authorizing the confiscation of all "obscene" materials upon the defendant's premises. Mr. Justice Brennan merely noted the absence of a prior adversary hearing on the question of the obscenity of the items to be seized. Speaking for the majority, he considered in detail, however, the error of the magistrate who granted the police a search warrant without the aid of procedures "designed to focus searchingly on the question of obscenity." No publication had been submitted to the magistrate before he issued the warrant. The war-

rant constituted an unlimited authority to seize any publications which the officers in their discretion considered to be obscene. Although the court suppressed the seized material, it nevertheless distinguished that extensive and indiscriminate suppression of challenged publications from the temporary restraints upon selected publications which it had approved of in *Kingsley Books, Inc. v. Brown*, 354 U.S 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (1957).

Then, in *A Quantity of Books*, the police made another mass seizure, confiscating 1,715 copies of 31 novels found on the defendant's premises. An adversary hearing had not been held prior to the issuance of the warrant which authorized the seizure, but the judge who issued the warrant made a 45-minute ex parte examination of the materials to be seized, and the titles of the novels involved had been listed in the information filed by the prosecuting attorney. The procedure was held to violate the constitutional restrictions against abridgment of freedom of speech and press "since the warrant here authorized the sheriff to seize all copies of the specified titles, and since [the defendant] was not afforded a hearing on the question of the obscenity . . . before the warrant issued".

We disagree with the 7th Circuit *Metzger* decision and its progeny that *Marcus* and *A Quantity of Books* and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S 495, 96 L. Ed. 1098, 72 S. Ct. 777 (1952), *Kingsley Int'l Pictures Corp. v Regents*, 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959), *Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964), necessarily require a prior *adversary* hearing on the issue of obscenity before a *motion picture film* can be confiscated as evidence. In fact, *Burstyn, Kingsley Pictures*, and *Jacobellis* did not consider the

specific question of a prior adversary hearing. In both *Marcus* and *A Quantity of Books* the statute being enforced called for civil proceedings directly against the materials and for their eventual destruction. In both instances, the police impounded all of the allegedly obscene publications they found on the premises. Most crucially, the great amount and variety of materials sezied without sufficient judicial guidance created a substantial risk that non-obscene publications would also be suppressed. Certainly the scope and consequences of those seizures warranted the imposition of additional procedural safeguards. But the necessity for a prior adversary hearing is substantially less when as here, the seizure is limited to a single item, the detention is temporary, and the action is initiated only after a cautious judicial scrutiny of the sensitive issues involved.

The single pronouncement of the United States Supreme Court concerning the seizure of a motion picture film as evidence for an obscenity prosecution supports our interpretation of *Marcus* and *A Quantity of Books*. In *Lee Art Theatre*, the Supreme Court, on the authority of *Marcus*, reversed the conviction of the operator of a motion picture theater for possessing and exhibiting obscene and lewd films. The per curiam opinion noted, however, that the warrant had been issued solely on the basis of conclusory statements in the affidavit of a police officer and that the issuing magistrate had not inquired into the factual grounds for the officer's assertions. Because that process obviously failed to satisfy *Marcus's* demand for a procedure "designed to focus searchingly on the question of obscenity" the confiscation of the film was improper, and its introduction into evidence against the defendant necessitated a reversal of his conviction.

Significantly, the court did not suggest that the prior adversary hearing rule postulated in *A Quantity of Books* was applicable to the seizure of a motion picture film, even though it was obvious that the warrant was issued only after an ex parte proceeding. As noted in *Merritt v. Lewis*, 309 F. Supp. 1249, 1251 (E.D. Cal. 1970), "Whatever precedential value *A Quantity of Books* may have, its pre-seizure adversary hearing requirement is not yet applicable to motion picture cases." *Accord, Entertainment Ventures, Inc. v. Brewer*, 306 F. Supp. 802, 810 (M.D. Ala., N.D. 1969).

We agree with *Merritt* that the United States Supreme Court does not require a preseizure adversary hearing before an allegedly obscene motion picture can be confiscated for evidence. *Marcus* and *A Quantity of Books* suggest that such a hearing is constitutionally required only when a massive seizure of materials, apparently intended to suppress further dissemination of the contents, is effected through procedures insensitive to First and Fourteenth Amendment guarantees. As reemphasized in *Lee Art Theatre*, the primary test is whether the judicial inquiry leading to the seizure "focused searchingly on the question of obscenity" and was sensitive to the accused's freedom of expression.

Our examination of the record before us indicates that a clear and searching inquiry into the nature of the claimed obscenity of the movie was made by Justice of the Peace Albert J. Yencopal of Richland before he authorized the seizure of the film. The officer who testified before the court explained in detail some of the more distasteful and lewd scenes of the movie which were displayed upon the theater screen, and he discussed in general the balance of the

movie. We decline to set out here the narrative descriptions testified to by the Richland police officer. We are satisfied that the procedure followed in the justice court substantially complied with the preseizure mandates outlined in *Marcus, A Quantity of Books* and *Lee Art Theatre. See also, Bazzell v. Gibbens*, 306 F. Supp. 1057 (E.D. La. 1969), and *United States v. Wild*, 422 F.2d 54 (2d Cir. 1969). We conclude that the seized film "Carmen Baby" was properly admissible in evidence.

Defendant next argues that the trial court's conclusion of law that "Individual portions or scenes of the movie 'Carmen Baby' are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves" is not legally sufficient under existing United State Supreme Court decisions to support the judgment of obscenity.

Considering the facts before us within the framework of the legal principles enunciated in *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967), and *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), we conclude otherwise. Those cases indicate that movies which are obscene only in part may be constitutionally suppressed under state obscenity laws when the movie is commercially exhibited in such a way that it intrudes upon the privacy of nonconsenting citizens who cannot as a practical matter avoid being exposed to the film.

The defendant here does not contend that "Carmen Baby" is totally devoid of obscene material and the record indicates that it is not. Defendant stresses instead that *Roth v. United States*, 354 U.S 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957), stands for the proposition that

items are not obscene unless "the dominant theme of the material taken as a whole appeals to prurient interest." Defendant argues, therefore, that the reliance by the trial court on isolated excerpts in determining the worth of the film's contents was erroneous. However, the analysis of the trial court did not have to be guided solely by the *Roth* definition. Although the court's findings and conclusions might have been better enunciated, we find that they sufficiently articulated a sound legal basis for the judgment.

We necessarily viewed the film and found it personally distasteful, offensive and devoid of social, philosophical or artistic merit. However, this court cannot enforce its personal tastes in the guise of law. We are charged with the duty of upholding our state and federal constitutions and of ensuring to each citizen the fullest exercise of the guarantees contained in those documents. When, as here, freedom of speech and press are challenged by efforts of the police to enforce our state obscenity laws, our resolution of the challenge must necessarily be guided by the United States Supreme Court's troubled and often confusing explication of what expression constitutes obscenity and what expression is entitled to the protective liberties of the federal constitution's First Amendment.

Unfortunately, that court's attempt in *Roth* to define obscenity *vel non* has continued to disappoint and confuse the courts, commentators and community alike. Subsequent opinions in explanation or modification of the initial *Roth* formula have revealed only a growing disharmony among the views of the Justices. We would concur with Justice Harlan's lament in *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 707, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968), that "The upshot of all this divergence in viewpoint is that

anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment." The *Roth* definitional approach to obscenity is best summarized by Justice Brennan in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413, 418, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966).

> We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is uttelry without redeeming social value.

We have considered the film "Carmen Baby" with strict attention to those legal touchstones and assert that the dominant theme of the motion picture appeals to the prurient interest. The quantity and variety of sexual acts implied or expressly shown on the screen is out of proportion to its necessity or its part in the film's "theme". But *Jacobellis* and *Memoirs* emphasized that a work must also be *utterly* without redeeming social value in order to be proscribed by the state. Here, testimony at the trial elicited from several members of the Richland community was rather evenly divided on the question of whether the movie was offensive to the standards relating to sexual matters in that area and whether the movie advocated ideas or was of artistic or literary value. Thus, if we were to apply the

strict rules of *Roth*, the film "Carmen Baby" probably would pass the definitional obscenity test if the viewing audience consisited only of consenting adults.

However, we find that "Carmen Baby" is obscene when we consider, as the trial court did, the *context* of its exhibition. Our support for this holding is found in *Redrup v. New York, supra*, and in three 1966 United States Supreme Court decisions that inaugurated a "contextual" approach to materials not strictly definable as obscene.

In *Memoirs*, the Supreme Court reversed a judgment that the book "Fanny Hill" was obscene, primarily because the state court had minimized the social value element now incorporated into *Roth*. But Justice Brennan's opinion, characteristically joined only by Justices Warren and Fortas, also noted, at page 420:

> It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances . . . the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected.

This concern with the circumstances surrounding the dissemination was picked up in the companion case of *Ginzburg v. United States*, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966). There the "pandering" principle was engrafted upon *Roth*, and the defendant's conviction for mailing obscene materials was affirmed. In adopting what has been termed a "contextual" or "variable" approach, the court drew on the concurring opinion of Chief Justice Warren in *Roth*, when it said:

> We perceive no threat to First Amendment guarantees in thus holding that *in close cases evidence of*

> *pandering may be probative* with respect to the nature of the material in question *and thus satisfy the Roth test* . . . the fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthen the conclusion that the transactions here were . . . not sales of constitutionally protected matter.

(Italics ours.) *Ginzburg*, 383 U.S. at 474.

The same majority in *Mishkin v. New York*, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (1966), upheld a New York conviction for producing and possessing for sale obscene books that featured sadomasochism, fetishism and homosexual practices. Admittedly aimed at appealing to "a clearly defined deviant sexual group, rather than the public at large," the court interpreted *Roth* to support the suppression of materials directed at "the sexual interests of its intended and probable recipient group."

In these cases, the court offered a flexible "contextual" analysis to supplement the strict definitional requirements of *Roth*. In "close cases" where the elements of *Roth* as interpreted in *Memoirs* could not be satisfied, the court allowed the consideration of the circumstances of the production, sale and distribution of the alleged obscene material.

One year later in *Redrup*, the Supreme Court added two more bases which justify state control of arguably obscene materials. There, the per curiam opinion reversing three state obscenity convictions focused sharply on "contexts" where the method of distribution thrust offensive, but perhaps not constitutionally obscene materials, upon juveniles and an unwilling public.

> In none of the cases was there a claim that the statute in question reflected a specific and limited state

> concern for juveniles. See *Prince v. Massachusetts*, 321 U.S. 158; cf. *Butler v. Michigan*, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. *Breard v. Alexandria*, 341 U.S. 622; *Public Utilities Comm'n v. Pollak*, 343 U.S. 451. And in none was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463.

*Redrup*, 386 U.S. at 769.

We are satisfied that *Redrup's* emphasis on the preservation of individual privacy from the assault of offensive expression offers a reasonable and correct basis for our decision. The principal case relied upon by that court to support the privacy rationale, *Breard v. Alexandria*, 341 U.S. 622, 95 L. Ed. 1233, 71 S. Ct. 920 (1951), further delineated the scope of this contravailing right. In *Breard*, the court upheld a local ordinance requiring solicitors to obtain a homeowner's consent before entering the homeowner's premises. The claim of a magazine subscription salesman that the ordinance violated his First and Fourteenth Amendment freedoms of speech and press was denied when the court said that the guarantees of free speech and free press may not be misused to invade the privacy of one's home.

Then in *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), *Redrup's* protection of the privacy of the home was expanded to include a university hallway. That judgment overturned a decision of a district court that the University of Massachusetts had violated the First and Fourteenth Amendment rights of one of its art instructors when it removed his controversial art display from the corridor walls of the institution. The district court had found that the

embarrassment and annoyance caused by the obscene paintings were not sufficient to warrant abridgement of the plaintiff's right of free speech. Balancing the interests of the plaintiff instructor against the rights of the users of the corridor, the court concluded that:

> Where there was, in effect, a captive audience, defendants had a right to afford protection against "assault upon individual privacy," *See* Redrup v. New York . . .

*Close v. Lederle*, 424 F.2d 988, 990 (1st Cir. 1970).

Thus the court affirmed the university's action. It also noted that the reasonableness of the university's action was bolstered by the fact that children regularly used that particular corridor where the offensive materials had been displayed.

We are satisfied that under the circumstances of this case the defendant was rightly convicted for exhibiting an obscene motion picture film. We find that the defendant's exhibition of an arguably obscene film in close proximity to the homes and highways of the Richland community posed more than an unreasonable annoyance to the public. The record places 12 to 15 private residences and a major thoroughfare within viewing range of the theater's screen. Considering the visual content and impact of many of the film's scenes, the defendant should have known that these residents and motorists would be repeatedly and unwillingly confronted with glimpses of lurid and deviant sexual conduct as they pursued their normal activities. As noted in *Landau v. Fording*, 245 Cal. App. 2d 820, 827, 54 Cal. Rptr. 177 (1966), *aff'd per curiam*, 388 U.S. 456, 18 L. Ed. 2d 1317, 87 S. Ct. 2109 (1967):

> the visual impact of a motion picture are distinguished from other media can [not] be disregarded. Films are obviously different from other forms of expression (*Freedman v. Maryland*, 380 U.S. 51, at p. 61 . . .) . . . Even in the absence of sound, movies assure a high degree of attention and retention . . .
>
> Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word.

*See also, United States v. A Motion Picture Film Entitled "I Am Curious-Yellow"*, 404 F.2d 196 (2d Cir. 1968) and *Wagonheim v. Maryland State Bd. of Censors*, 255 Md. 297, 258 A.2d 240 (1969). To argue that the adjoining homeowners and motorists in the vicinity of the outdoor theater could have preserved their freedom to view what they pleased by drawing their curtains or averting their eyes is specious.

*Redrup's* reliance on *Breard* and *Pollak* suggests that an adjustment between the rights of the disseminator and the nonconsenting viewer should take into consideration the public or private nature of the encounter. Perhaps the passing public motorist, experiencing only a momentary shock and possessing the ability to avoid further embarrassment by proceeding on his journey, suffers an incidental intrusion on his privacy too minor to warrant official action. But the sanctity and immobility of the private residence suggest different considerations when the homeowner is affronted by lascivious conduct in the normal course of domestic activities. The right of the homeowner to be free from the intrusion of unsolicited offensive displays is obviously paramount to the outdoor theater manager's absolute discretion to choose what films he will exhibit to a

willing and unwilling audience. Within the confines of his own property, a citizen should be able to select what stimuli he and his children will encounter. And that right of privacy cannot be unreasonably curtailed by another citizen under the guise of freedom of speech and press.

Although this court has never declared whether there is an independent right of privacy in this state (*Lewis v. Physicians and Dentists Credit Bureau, Inc.*, 27 Wn.2d 267, 272, 177 P.2d 896, 899 (1947)), there can be little doubt after *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965), that the right of privacy is enshrined as a constitutional doctrine. *See* generally, W. Prosser, Law of Torts, § 112 (3d ed. 1964); 31 Law and Contemporary Problems 251-435 (1966); 64 Mich. L. Rev. 197-288 (1965). In *Griswold*, the United States Supreme Court held unconstitutional a Connecticut law prohibiting the use of contraceptives. Speaking for the majority (at 485), Justice Douglas found the law to be a destructive intrusion on the marital relationship, "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." Certainly the home lies within a "zone of privacy" which merits the protection of this court. And individual privacy is nowhere more entitled to protection than in the home.

We conclude that when a citizen's home is intruded upon by the unsolicited exhibition of lewd and offensive films, and there is no reasonable alternative to avoid viewing those films, such obtrusive displays violate that resident's "individual privacy" and his right to domestic solitude, and such display is contrary to RCW 9.68.010.

It may be beyond the scope of this decision to detail the

concern of this court for the welfare of the teenage and preteenage children who viewed this film from outside the theater fence. However, we note with approval that *Stanley v. Georgia*, 394 U.S. 557, 567, 22 L. Ed. 542, 89 S. Ct. 1243 (1969), reaffirms the states' duty to protect children from contact with obscene material. Because RCW 9.68.010 did not reflect "a specific and limited state concern for juveniles" when the defendant was prosecuted, *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967) could not support our affirmance of the conviction solely on the fact that children were known to be part of the "free" audience outside the fence. But RCW 9.68 has since been amended. Laws of 1969, Ex. Ses., ch. 256, p. 2383, now provide for age restrictions on the viewing of "erotic" films. *See Interstate Circuit v. Dallas*, 390 U.S. 676, 690, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968); *Ginsberg v. New York*, 390 U.S. 629, 639, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968). And it is apparent that such legislation means that future "close cases" of this type will be amenable to an even broader application of *Redrup* on the basis of a "specific and limited state concern for juveniles."

We believe that the approach taken here today represents the current thinking in the area of obscenity by the highest court of our nation and offers the fairest resolution of the conflicting interests here presented. We adopt the statement of Justice Stewart, concurring in *Ginsburg*, that:

> The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a "free trade in ideas." To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen.

(Footnote omitted.) *Ginsberg*, 390 U.S. at 649.

The judgment and sentence of the trial court is affirmed.

/s/ McGovern, J.

We Concur:

/s/ Hamilton, C. J.
/s/ Rosellini, J.
/s/ Hale, J.
/s/ Ryan, J., Pro Tem

I Concur in the Result:

/s/ Neill, J.
/s/ Hunter, J.
/s/ Finley, J.

HALE, J. (concurring)—I concur except as to that part of the opinion which appears to say that material cannot be judicially held obscene unless *utterly* without social value (majority opinion, at page 12), as declared in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413, 418, 16 L. Ed. 2d 1, 86 St. Ct. 975 (1966). Deciding whether the material has little or substantial social, literary, educational or entertainment value is difficult enough without trying to determine if it is *utterly* without it. After all, a seed catalog or a film travelogue can be readily converted into pornography while retaining some vestiges of social or other value. Even the filthiest, most depraved and obscene work, recognized instanter to be such by everyone of ordinary understanding, may be claimed to possess some spark of social value and thus cannot be judicially said to be *utterly* without it.

Although the Supreme Court of the United States, as is seen in the court's opinion, has the last word on freedom of speech, I think it has no jurisdiction whatever under the constitution—except perhaps for the District of Columbia

—to prescribe moral, literary or social standards for the country at large. The judicial duty to protect freedom of speech and press in the Nation at large imports no correlative power to preserve obscenity and pornography in the states. "[O]bscenity is not within the area of constitutionally protected speech or press." *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957). Accordingly, filth, whether "filth for filth's sake" or "filth for money's sake," (*State v. Jacobellis*, 173 Ohio St. 22, 28, 179 N.E.2d 777 (1962), *rev'd sub nom., Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964)), is not and should not be granted immunity from community and moral standards and state law except where to deny such immunity amounts to a deprivation of freedom of speech and press. Freedom of speech and press is not a commercial license for obscenity and pornography. Nor is obscenity and pornography protected by the commerce clause. That Congress and the federal courts do not bar the interstate transportation of filthy, obscene and pornographic movie film, does not, I think, prevent the states in their constitutional exercise of the police-power from prohibiting the public sale and distribution of such materials. This is so for the same reason that allowing contaminated or adulterated foods and druge and other consumable goods to move in interstate commerce does not override the fundamental power of the states to prohibit their sale and distribution. A different rule, I think, would constitute a direct attack on the ideas of self-government.

Holmes' aphorism that freedom of speech does not import the right falsely to shout "fire" in crowded theaters applies with equal force to pornography. Freedom of speech and press does not, I think, license the public use of

pornography and obscene materials in business, commerce, politics and government.

/s/ HALE, J.

HUNTER, J. (concurring in the result)—I concur with the result of the majority, but would go further and hold the film "Carmen Baby" to be obscene under the definitions of *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct., 1304 (1957). That an exhibition of the film, even to consenting adults, would be in violation of RCW 9.68.010.

> We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S., at 489. Under this definition as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 418, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966).

It appears that the third element of the definition has caused confusion in the application of this definition.

I find no such problem. The definition should be considered in its entirety. The third element should not be considered in isolation of the remainder of the definition. If the material, taken as a whole, appeals to the prurient interest in sex, and is patently offensive because it affronts contemporary community standards relating to the repre-

sentation of sexual matters, then whether or not the material is utterly without redeeming social value, should be determined in the light of contemporary standards of the community.

Because there may be some in a community who disagree with the contemporary standards and, in their opinion, deem the material to have some redeeming social value, does not by itself remove that material from the definition of obscenity.

In the instant case the film "Carmen Baby" was exhibited to this court. It became undisputed evidence in the case. Therefore, this court is in as favorable a position as the trial court to make a valued judgment and independent judicial determination as to whether this film is utterly without redeeming social value.

To detail the repulsive, errotic [sic], pornographic scenes that dominate the entire theme of this film is unnecessary to this opinion. The majority unhesitatingly state:

> We necessarily viewed the film and found it personally distasteful, offensive and *devoid of social*, philosophical or artistic merit.

(Italics mine.)

Why then should the opinion of some witnesses in the record modify the opinion of the members of this court. To do so unqualifiedly would be to allow their usurpation of a judicial function.

This court must make the final determination as to whether the film "Carmen Baby," the undisputed evidence in this case, comes within the *Roth* definition and is obscene. Unquestionably the dominant theme of the film appeals to the prurient interest in sex. We can take judicial

notice that it does affront contemporary community standards. Applying these standards, it is utterly without any redeeming social value.

This court therefore should, without equivocation, hold that the film is obscene, and any exhibition thereof, even to consenting adults, is in violation of the statute, RCW 9.68.010, *supra*.

/s/HUNTER, J.

FINLEY, J. (concurring in the result)—I have some lingering reservations as to the constitutionality of the procedure employed in seizing the questioned film—*i.e.*, the lack of a prior adversary hearing on the question of obscenity. I nevertheless concur in the result reached by the majority on the ground that exhibition of the film "Carmen Baby" under the specific facts of this case—*i.e.*, in a location unrestrictedly frequented by juveniles—does not fall within the constitutional protection of the first amendment to the United States Constitution. Furthermore, in my opinion, the facts surrounding exhibition of the film "Carmen Baby" in the case before us support a finding of pandering on the part of the appellant as to those minors who actually viewed the film.[1] It is obvious from the record that the appellant made no attempt to restrict viewing of the film by juveniles immediately outside the chain link fence. Such inaction was potentially an economic benefit to appellant in serving to attract juveniles to become pay-

1. Pandering may be found to exist, as I understand the relevant federal cases, when the questioned material is "created or exploited entirely on the basis of its appeal to prurient interests . . ." *Ginzburg v. United States*, 383 U.S. 463, 474, 16 L.Ed.2d 31, 86 S. Ct. 942 (1966). Where the relevant evidence supports a finding that a solicitor's or exhibitor's actions amount to pandering, *"such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."* (Italics mine.) *Ginzburg*, 383 U.S. at 476.

ing customers and with a somewhat logically predictable result the juveniles as "free" customers would, by word-of-mouth, attract additional paying customers.

It appears to me that, perhaps, the majority assumes too much in applying, or, possibly, in attempting to extend the application of, the contextual or variable approach developed in *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967), and *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970). Namely, the facts of the instant case do not, in my opinion, support the finding of an assault upon individual privacy "in a manner so obtrusive as to make it *impossible* for an unwilling individual to avoid exposure to it" such as described in *Redrup* and *Close*.

While I can agree with, and would support, application of the "contextual" approach in an appropriate case, as I read the record before us, it is silent or lacking as to any complaints actually made by motorists or residents of the area, and thus there seems to be no indication that, in fact, *the individual privacy of any homeowner or passing motorist was assaulted*. Decisions of the federal courts in the area here involved seem to me to indicate that the First Amendment rights cannot be circumscribed absent clear proof of an *actual assault* upon the rights of a nonconsenting individual.

Finally, in terms of the foregoing, it appears to me the rationale of *Redrup* and *Close* may be somewhat misapplied in the following passage from the majority opinion:

> The right of the homeowner to be free from the intrusion of unsolicited offensive displays is obviously paramount to the outdoor theater manager's absolute discretion to choose what films he will exhibit to a willing and unwilling audience.

It is my feeling this statement would be more appropriate if there had been complaints or were this an action for nuisance brought by offended homeowners. This particular language in this case does not, in my opinion, sustain censure of the film absent proof of actual assault upon the privacy of a specific individual.

In any event, for the reasons stated, I concur in the result reached by the majority.

/s/ FINLEY, J.

I concur

/s/ NEILL, J.

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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## PART II.

### Portions of State Court Record Relating to Questions Sought to be Reviewed

# IN JUSTICE COURT

Richland District, Benton County, Washington

THE STATE OF WASHINGTON
vs.
JOHN DOE

No. 2169

CRIMINAL COMPLAINT

For OBSCENITY R.C.W. 9.68.010

Before me Albert J. Yenconal, a Justice of the Peace, in and for the said County, this day personally appeared W. H. GORDON who, being first duly sworn, on oath complains and says: That on the 29th day of August, 19.68, at Richland in the County of Benton and State of Washington JOHN DOE did wrongfully and unlawfully cause to be exhibited an obscene, indecent and immoral show,

contrary to the form of the Statute in such cases made and provided, against the peace and dignity of the State of Washington.

Wherefore said complainant prays that the said defendant JOHN DOE may be arrested and dealt with according to law.

W. H. Gordon

Subscribed and sworn to before me this 30th day of August, 19.68.

Albert J. Yenconal
Justice of the Peace in and for said County.

IN JUSTICE COURT, RICHLAND PRECINCT, BENTON COUNTY, WASHINGTON, BEFORE HON. ALBERT J. YENCOPAL, JUSTICE OF THE PEACE

| | |
|---|---|
| STATE OF WASHINGTON, *Plaintiff,* v. JOHN DOE, *Defendant.* | No. 2109 HEARING August 30, 1968 |

This matter having come before the undersigned upon the request of W. H. Gordon, Sergeant of the Richland Police Department to determine whether there is probable cause to issue a John Doe warrant upon either the manager or the motion picture project operator of the Park In Y Theater, situated in Richland, Washington, and to arrest him for showing an obscene, indecent and unnatural show; and the Court having sworn in the said Sgt. Gordon, the following is a colloquay [sic] between the Court and said Sgt. Gordon:

Q. What is the name of the show?

A. Carmen Baby

Q. Did you personally see the movie on the night of August 29th, 1968?

A. Yes.

Q. Did you see all of the movie?

A. Most of it.

Q. Did you see any portion of the movie on some other night?

A. Yes, approximately 20 minutes on August 28th, 1968.

Q. Did you stop to see the movie?

A. I was making a routine patrol on the west side of the

theater when my attention was called to a very lewd scene.

Q. Upon what do you base this,—I mean, tell me what you saw.

A. The scene was a young man lying on the bed nude from his waist up and the girl sitting on the bed in a revealing black slip. This girl started fondling the young man and he was going through great emotional stress according to the features on his face. She sat up on the bed and removed her panties, dropped the panties across the young man's mouth and proceeded to kiss him violently through the panties on the mouth. The young man's emotions were greatly aroused and the girl kissed him on his breast, and her head slowly moved as she kissed him on his middle and then her head disappeared from view. The rest of the scene was shots of the emotions on his face, as he apparently reached a climax as her finger moved in and out of his ear.

Q. Where there other scenes of unnatual emotions?

A. On Thursday night the City Attorney Tom Heye and I observed most of this picture. Other scenes depicted a very attractive young woman sitting with her back against the wall in a revealing slip. Another young woman fondled her, and her head slipped down across her breast until her head disappeared, and the scene depicted the emotions on her face, showing that she apparently reached a sexual climax.

It was observed by Mr. Heye and myself that there were several young teenage children watching this film from around the fence, ages of about 11 to 14, and some younger at the back street I believe called Geneva Street.

Q. How old are you Sgt. Gordon?

A. 53 years old.

Q. How long have you been a police officer?

A. 27 years, almost 25 years with the Richland Police Force.

Q. Do you have any children?

A. Yes, I have four grown children.

Upon the testimony heard by the Court, there is probable cause to issue the John Doe warrant.

DONE By The Court this 30th day of August, 1968.

/s/ ALBERT J. YENCOPAL
*Justice of the Peace*

STATE OF WASHINGTON, }
County of BENTON } ss. In Justice Court RICHLAND PRECINCT ~~DISTRICT~~ District,

TO THE SHERIFF OR ANY CONSTABLE OF SAID COUNTY:

WHEREAS, W. H. GORDON has this day complained in writing, under oath, to the undersigned, one of the Justices of the Peace in and for said County, that on the 29th day of August, 19 68, in said County and State, JOHN DOE

did commit the crime of obscenity, RCW 9.68.010

Therefore, in the name of the State of Washington, you are commanded forthwith to apprehend the said JOHN DOE and bring him before me to be dealt with according to law. Bail is fixed at $ 300.00

Given under my hand this 30th day of August, 19 68

Justice of the Peace

IN JUSTICE COURT, RICHLAND PRECINCT, BENTON COUNTY, WASHINGTON, BEFORE HON. ALBERT J. YENCOPAL, JUSTICE OF THE PEACE

| | |
|---|---|
| STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.* | No. 2109 MOTION TO SUPPRESS EVIDENCE AND DISMISS CHARGE |

COMES NOW the defendant, William Rabe, by and through his attorneys, Critchlow, Williams, Ryals & Schuster, and moves the court for an order suppressing as evidence the film "Carmen Baby", which was seized by the Richland Police Department and further moves that the charge brought against the defendant, based on this evidence, be dismissed. The basis for this motion is set forth in the brief submitted herewith.

DATED this 18 day of September, 1968.

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
Attorneys for Defendant
By: REMBERT RYALS

IN JUSTICE COURT, RICHLAND PRECINCT, BENTON COUNTY, WASHINGTON, BEFORE HON. ALBERT J. YENCOPAL, JUSTICE OF THE PEACE

| | |
|---|---|
| STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.* | No. 2109 NOTICE OF APPEAL |

TO: Justice of said Justice's Court, and

TO: Herbert E. Davis, Prosecuting Attorney of the County of Benton, State of Washington:

TAKE NOTICE that the defendant, William Rabe, in the above-entitled action hereby appeals to the Superior Court of the State of Washington, in and for the County of Benton from the judgment and sentence herein made and entered in said Justice's Court on the 7th day of October, 1968.

DATED: This 7 day of October, 1968.

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
Attorneys for Defendant, Appellant
By: REMBERT RYALS

Copy received this 8th day of October, 1968.

/s/ CURTIS LUDWIG
CURTIS LUDWIG, Deputy Prosecuting Attorney

Notice of Appeal

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Providence, Sc. SUPERIOR COURT

JOSEPH C. SCUNGIO, et al, Members of
THE BUREAU OF LICENSES
v.
COLUMBUS THEATER, INC.

C.A. 67-4565

Heard before: Mr. Justice Bulman
November 20, 21, 22,
24, 27 and 28, 1967.

*APPEARANCES*

Vincent Piccirilli, Esq.
Robert McOsker, Esq. .....Plaintiff
Milton Stanzler, Esq. .....Defendant

*Tuesday, November 28, 1967*

BULMAN, J. Decision here for the defendant and judgment will enter. I always give my decision first so lawyers won't sit and wonder, while I'm thinking out loud for five or ten minutes giving the reasons, what the decision will be.

Gentlemen, this has been a well-tried case: Mr. McOsker, Mr. Piccirilli, and Mr. Stanzler. It was not an easy case to sit here and listen to because it's not the kind of case a Judge can really get hold of and squeeze something out of—all the expert testimony, as I have characterized it, is like a handful of marshmallow fluff—you squeeze it a little bit and it slides out between your fingers.

I am not in this decision going to take any great amount of time or say anything about the film which might constitute free advertising for Mr. Berberian. The film is trash and it doesn't deserve advertising from the Court. The

plaintiff's burden here was to establish by a fair preponderance of the evidence that this film, "Carmen Baby," is obscene in the constitutional sense and "in the constitutional sense" refers to what the U. S. Supreme Court right up to the last determination has declared to be obscene. They have given us some guidelines. Based on all the evidence for the plaintiff and the defendant, and not discounting my own view of the moving picture, which I consider as real evidence here, I'll echo a little bit of what Mr. Justice Brennan is supposed to have said back in one of the recent cases, it was in the Ohio case, *Jacobellis against Ohio*, 378 U.S. 184. He didn't attempt to define hard core pronography. It was no easy matter, but he said "I know it when I see it, and the motion picture involved in this case is not that." I say the same about this one. I think I would recognize hard core pornography and this movie is not that. It may come fairly close, at least in some of the scenes it's pretty gamy; as a matter of fact, "dirty." You know, that "panty scene," that goes beyond customary limits, I think; with all the deference to the Yale professor who said only that it gets pretty close to the outer limits. That one scene, taken alone, is offensive by any standard, but I can't condemn the film on that scene alone. It should be noted that new contemporary standards are established as we go along, and that might be one scene which would become a basis for a new and more offensive contemporary standard in the future, but that's not before me.

Be that as it may, on the three criteria which I must apply here, and which I did apply in reaching the decision I did, I find that this film has plenty of prurient appeal, so to speak, but I'm not satisfied the plaintiff has established by a fair preponderance of the evidence that

the dominant theme in that area exceeds what the U. S. Supreme Court has said to be legally permissible, and the same as to contemporary standards. It's pretty gamy, and there are certainly some scenes which, to borrow the phrase used by Professor Lawder, might be close to the "outer limits of candor" or even go beyond them. But there again, taken as a whole, the City has not proven that it is offensive, patently offensive to contemporary community standards.

Finally, on the third of the three criteria, "utterly without redeeming social value," when the U. S. Supreme Court overturned a decision by the Massachusetts Supreme Judicial Court and said that the Massachusetts Court was wrong in using the words "substantially without redeeming social value;" the standard we set here in Washington for the entire country is "*utterly* without redeeming social value." I can't say after having listened to all the experts for the plaintiff and for the defendant and having viewed the film, that it is "*utterly* without redeeming social value." As far as the method of advertising goes, I don't think it achieves the requisite "pandering" quality that the Supreme Court had in mind when they decided against Ginzburg. It might get a little close, but actually there is not a great deal of difference between the New York Times ad and the Providence ad. Just one quote is taken out, the rest of the stuff is there. The picture of the girl might be offensive to some people—just that picture, considering the type of activities portrayed in the film—but the City has not carried its burden in this case, either.

I found out quite a while ago—well, not quite a while ago, I have only been up here three and a half years—some cases you decide because you have a feeling for

them. This is one of them. My feeling is that the plaintiff hasn't carried the burden of proof. I'm not satisfied that the plaintiff has established his case. I can't be a censor, I'm not the guardian of the morals of a community, and I must take the law from the U. S. Supreme Court as they give it to me.

I find as a fact that the City has not carried its burden of proof as to any of the requisite criteria, including pandering, and so has failed to establish obscenity of the film itself or its method of advertising.

I conclude that no injunction can issue.

One thing in passing, Judge Jacob of Connecticut, in a very interesting article on the controlling of obscenity in Connecticut in the June, 1967, Connecticut Bar Journal, concludes with this short paragraph: "It is submitted that the Connecticut definition of obscenity based on Roth is no longer adequate. The Roth test has been strengthened and revamped. It will be more difficult to find material which meets the standards." I think that well expresses the current situation. By the way, gentlemen, you're both here in Court. Since no injunction will issue, judgment for the defendant will be entered immediately and time to take any corrective measures in an appellate court runs from today, without further notice.

Let me add to the decision: having decided as I have, I don't get to the constitutional questions raised in defendant's answer.

## *CERTIFICATION*

I hereby certify that the preceding pages, 1 through 4 inclusive, are a true and accurate transcript according to my stenographic notes.

ANNA BODNAR

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, HUDSON COUNTY
DOCKET NO.

| | |
|---|---|
| VAN CURLER BROADCASTING CORP., *Plaintiff*, v. WILLIAM MUSTO, et al, *Defendants.* | Civil Action TRANSCRIPT OF PROCEEDINGS |

Friday, June 28, 1968
Hudson County Courthouse,
Jersey City, N. J.

BEFORE:

The Honorable ROBERT A. MATTHEWS, J.S.C.

APPEARANCES:

Messrs. STRYKER, TAMS & DILL
By: JOHN J. MONIGAN, Jr., Esq. for the Plaintiff.

EDWARD J. LYNCH, Esq., Corporation Attorney, City of Union City

JOHN DREWEN, Esq., Of Counsel for the Defendants.

SAMUAL VANDER VALK
Official Court Reporter

MR. MONIGAN: If your Honor please, this matter is before the court on an application on behalf of the defendants to vacate a temporary restraint which was contained in an order of this court granting an order to show cause dated June 26, 1968.

The original application was based upon a seizure of the film "Carmen Baby" under circumstances which the plain-

tiffs contended violated their constitutional rights because there had been no judicial determination which was required by the decisions of the court with which—the Supreme Court of the United States—with which the court is familiar; those being the cases which hold that a movie is entitled to the protection of the First and Fourteenth Amendments of the Constitution of the United States, and particularly the case of Jackobellis [sic] against Ohio, 378 U. S. 184, and Joseph Burstyn, Inc. against Wilson, 343 U. S. 475 (1951), and Freedman against Maryland, 380 U. S. 51.

Now, after the order to show cause with the temporary restraint was granted, this application was made to vacate the temporary restraint, and with the consent of counsel the court viewed the film last evening, and after a conversation in chambers which had occurred the position of the plaintiff was that it would consent to a determination by your Honor at the present time as if this matter were coming on final hearing, with the submission of the complaint which was filed in the United States District Court which led to a judgment of that court that the ordinance which was originally the vehicle for the City of Union City to proceed was unconstitutional because of the definition and various other provisions in that ordinance.

The present proceedings which led to the seizure was I believe made by a complaint to the magistrate, and the film was seized in that connection.

Now, so far as the aspect of the matter which would be regarded as a final hearing on the plaintiff's application for a permanent injunction, it has been agreed that a copy of the complaint in the United States District Court proceeding with its accompanying affidavit would be marked in

evidence, I believe over the objection of counsel for the defendant. Is that so?

MR. DREWEN: Over objection, yes.

THE COURT: It may be marked.

MR. DREWEN: Object to it as incompetent, irrelevant and immaterial.

(EXHIBIT P-1, COMPLAINT IN UNITED STATES DISTRICT COURT PROCEEDING, IS RECEIVED IN EVIDENCE.)

MR. MONIGAN: On the issue of contemporary standards as being one of the guiding tests which is applied to obscenity matters, we would like also to submit that an offer of proof, that one Luis Pesce, who was formerly a chairman of the State of New York Board of Censorship, which no longer is in operation, would testify that in his opinion as an expert, which qualifications he abundantly possesses, would testify that in his judgment judged by the applicable standards of the United States Supreme Court decisions, that "Carmen Baby" was not obscene.

We make a similar submission—oh, Mr. Pesce testified in the adversary proceeding in Providence, Rhode Island, which led to a conclusion that the film was not obscene there.

Also we would submit on final hearing the testimony, to like effect, by the head of the Yale School of Drama, Motion Picture Division.

I shan't burden the court with an argument upon the law and the applicable standards, nor shall I presume to cite all the cases which I think—with which everybody is familiar. If your Honor wants me to cite them, I shall.

THE COURT: Well, I want to know which ones you are relying on.

MR. MONIGAN: All right. The leading case is, of course, that of Roth against United States, 354 U. S. 476. It is from that decision which we first have the articulation that whether to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interest.

That decision has been further refined by the decision of the Supreme Court in Memoirs against Massachusetts, 383 U. S. 413 which even more restrictively articulated the Roth concept as requiring the existence of three elements.

Mr. Justice Brennan, speaking for the court, in the only opinion in which there was a sufficient concurrence of judges, said under this definition as elaborated in subsequent cases three elements must coalesce. It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The fact that motion pictures are the beneficiaries of the constitutional privilege of the First and Fourteenth was the subject of the cases that I cited to your Honor at the beginning of this opinion.

The most recent development in the line of these obscenity cases occurred on April 22, 1968, save for one case which I will refer to later, and those are Teitel Film Corporation against Cusick—the official citation is not yet available—it's 88 Supreme Court 754—and Ginsberg against

State of New York, and Interstate Circuit, Inc. against Dallas; numbers 47 and 56 and 64 in the '67 Term.

The per curiam opinion in Redrup, which I have just mentioned, is valuable simply for a resume of the divergent views of the members of the court; and more recently there were a number of decisions of the Supreme Court, all of them memorandum opinions, all of them are contained in 388 U.S., and they are Tannenbaum against New York, 388 U. S. 439; Jacobs against New York, 388 U.S. 431, 87 Supreme Court 2098, case number 2, and a number of additional memorandum decisions which I shan't burden the record with. They simply reiterate the divergent views of the court, of the members of the court, as has been expressed in the cases already cited.

In that posture of the matter, your Honor, there remains only for purposes of the record a decision of the Supreme Court on June 18, 1968, in Lee Art Theater against Virginia, which was number 997 of the 1967 Term. It's reported in 36 Law Week 3480. However, that last cited decision has really no particular pertinence at the present posture of this matter because we have passed the question of the seizure before adjudication.

So that based upon those matters and taking into consideration the decisions and your Honor's own conclusions on the basis of the viewing of the film, it is the submission of the plaintiff that clearly the film "Carmen Baby" does not have the coincidence of the three mandatory requirements which have been enunciated in Memoirs, and for that reason the temporary restraining order already granted should take the form of a final injunctive order directing the defendants and each of them to return the print of the

film "Carmen Baby" as prayed in the complaint and to cease and desist from further interfering with the show of the or exhibition of the film "Carmen Baby" at the Lincoln Theater in Union City.

THE COURT: Why do you say that?

MR. MONIGAN: I'm sorry?

THE COURT: What do you base you conclusion on? Let's get into the facts. You saw the film too.

MR. MONIGAN: I did, your Honor.

THE COURT: You sat two seats away from me.

MR. MONIGAN: Thats right.

THE COURT: Why? Why did you come to this conclusion?

MR. MONIGAN: The film, as your Honor knows, perhaps better than I, has the almost identical libretto as Bizet's "Carmen," and the dialogue, as your Honor will recall, was pretty much identical with the libretto.

THE COURT: In spots.

MR. MONIGAN: In spots, yes. The theme of the film was such as to indicate that the principles of usual moral concepts at least which were palatable in the nineteenth century at the time of the showing of "Carmen" first in Paris were still viable. That is to say, evil was punished, and there did seem to be almost no virtue that I was able to discover in the film, but presumably it was rewarded in the sense that it was not the subject of any discussion.

The community standards which are required to be applied to the film, as your Honor knows, our [sic] national standards. The picture was in technicolor. There were a number of pictures of harbour scenes and cabaret scenes

and the central squares and countryside, and so forth, which must be considered as part of the general context of the film, because the standard as viewed in its continuity totality of continuity, is its basic appeal to the prurient interest in sex.

THE COURT: That was covered by the other scenes.

MR. MONIGAN: The other—

THE COURT: The ones you haven't mentioned.

MR. MONIGAN: The scenes which were displayed in the film were different from scenes which would be regarded as tolerable by general community standards some years ago, in the same fashion that the books which have been adjudicated as not being obscene by present-day community standards would be unthinkable except in a very restricted audience some years before.

So far as the present clinical absorption with scenes and descriptions of sexual activites which currently inhabit all of the contemporary novel themes, there has been a departure certainly from those days when it used to be said obscenity rather than the actual expression, and so that the degree of community standards or the acceptance of community standards at the present time so far as the existence of bedroom scenes, of which there were several in the film, are not remarkable by present-day standards because they are a commonplace subject of rather detailed clinical reporting in almost all the books that one reads nowadays.

But whether indeed the concept of obscenity is one which can be precisely defined, it seems perfectly evident the Supreme Court has had a difficult time formulating the concept, and the matter really I submit depends upon a

sophisticated approach to what is protected under the First and Fourteenth Amendments to the Constitution of the United States.

THE COURT: I think we can start out by saying all expression is protected.

MR. MONIGAN: All. Right. Now, we have that rather vague one: utterly without redeeming social value.

Utterly without redeeming social value seems an interesting formulation and can I think correctly be considered to apply only in those situations where there is absolutely no rhyme or reason for the portrayal of the activities which are portrayed other than a simple sex-for-sex-sake in totality.

I don't know whether there is any—we can say I think quite clearly what we—although the courts have had trouble with it—there are some sort of things which I think everybody would agree are hard-core pornography, although we would be perhaps somewhat pressed to say, to articulate a general definition of it.

THE COURT: French postcards. Filthy movies.

MR. MONIGAN: Yes. Filthy pictures. That sort of thing, yes.

Now, this film "Carmen Baby" had a good deal more to it than that. So far as the story line is concerned, it had—certainly it would not by any sensible standards suggest to anyone that Carmen was the sort of young lady that a, or a young person, that a sensible person would have anything to do with.

Indeed, the degree of difficulty presented by all who came in connection with her would certainly suggest the

sensible moral theme, that Carmen was not a person to emulate.

The situation of—the fact that she was a prostitute is a common factor—common story theme. The one perhaps relevant question, relevant issue on the question of obscenity, is how was that theme portrayed. Carmen was portrayed in this film as a—and perhaps—so far as anything that I observed in it, she had no redeeming features, except momentarily perhaps the idea that she did want to alter her change of life, or her state of life, and did not adhere to those decisions.

The ingenuousness of the hero or tragic figure in it was certainly difficult to accept as a story line. But again the story line was the same story line as existed before.

In short, our submission is that the only difference really in the film "Carmen Baby" and the opera is that the things which were clearly assumed to exist in the opera and which did not take place on the opera stage were displayed on the screen.

There is no question that the characters were virtually the same. The relationship between the characters were the same. The only difference was, as I have said before—

THE COURT: No bull fights.

MR. MONIGAN: Yes. And we have—and again judging by contemporary standards—we have progressed or retrogressed through the developments of Carmen, that we had the matador as the hero figure; then your Honor will recall that we had, during 1942 or so, we had a prizefighter who was the substitute for the toreador; and now we have a folk singer who takes the place of the heavy attraction.

So whether the film is one which any of us would have gone to see had not this litigation made it necessary or appropriate to do is I think besides the point.

I think that the question is, in your Honor's considered judgment, viewed as he is obliged to view these things, compelled to the conclusion that this film is so utterly in totality without any value other than appealing to the prurient interest in sex, that the teaching of the cases is such that the conclusion of this court should be that "Carmen Baby" is entitled to this constitutional safeguard.

THE COURT: Judge Drewen.

MR. DREWEN: May it please your Honor, I shall be very brief. Mr. Monigan has taught me that I should not embark upon any discussion of the picture.

THE COURT: You didn't see it.

MR. DREWEN: Pardon?

THE COURT: You didn't see it. I would suggest that you do not.

MR. DREWEN: May I proceed?

THE COURT: Yes.

MR. DREWEN: Our courts have defined obscenity, which is the subject matter of your Honor's judicial determination. The definitions in the Roth case and in other cases are clearly well known and understood by your Honor, and your Honor has seen the picture, and we await judgment thereon as required by the law in the premises.

THE COURT: Why do you say this picture is obscene?

MR. DREWEN: What is that?

THE COURT: Why do you say it's obscene?

MR. DREWEN: I say it's obscene because of what they

say about it themselves in the moving papers in the Federal court, for one thing.

THE COURT: Have you ever read James Joyce's "Ulysses"?

MR. DREWEN: Sir, yes.

THE COURT: That was made into a motion picture.

MR. DREWEN: I don't know. I never saw it.

THE COURT: James Joyce's "Ulysses" is held to be a work of art.

MR. DREWEN: It may have been. I don't know. Whether or not a matter is, a creation is a work of art, and also something else, is a very profound question.

THE COURT: That's the old problem of art and prudence, isn't it?

MR. DREWEN: That's right.

THE COURT: And that's the problem for the artist. Is it not?

MR. DREWEN: Aren't we going afield here?

THE COURT: Why?

MR. DREWEN: No? Now, with regard to the—

THE COURT: Well, you're going to exclude the artist from the community, aren't you?

MR. DREWEN: It will depend upon who the artist is. Maybe he ought to be excluded.

THE COURT: But we aren't fascists.

MR. DREWEN: Pardon?

THE COURT: We aren't fascists.

MR. DREWEN: Of course not. That is another subject entirely. We are not dealing with that.

THE COURT: Well, then, how do we exclude him?

MR. DREWEN: How do we exclude him? In the manner in which you Honor intended when you used that word.

THE COURT: By due process of law.

MR. DREWEN: Yes.

THE COURT: And what happens to our society if we exclude the artist?

MR. DREWEN: I don't know.

THE COURT: One of the arguments that is being made about our current life is that it's being dehumanized.

MR. DREWEN: Being what?

THE COURT: Dehumanized.

MR. DREWEN: No. It's not being dehumanized. I think the Pope has the right idea, that it's being depersonalized.

THE COURT: Well—no comment.

MR. DREWEN: All right. Now, with regard to the—

THE COURT: That was a low blow.

MR. DREWEN: With regard to the offer of the complaint in the Federal case, it's incompetent, and that's all I'll say about it, and has no place as proof in any sense on this inquiry. An individual film is an individual case, and there can be no reference to other decisions on other cases without getting away from the problem before us.

There was no search here and no seizure here and no execution of any warrant here, and the case of Lee Art Theater has no application because—

THE COURT: Oh, I beg to differ with you. There was a seizure here.

MR. DREWEN: There what?

THE COURT: There was a seizure.

MR. DREWEN: No. The officers say that there was no objection to their taking the film away as evidence, which it was their duty to do, by the way. No police officer can see a man put a gun in his pocket and let him walk away with it.

THE COURT: Yes, but somebody made a judgment he shouldn't have made.

MR. DREWEN: How?

THE COURT: Somebody made a judgment that he shouldn't have made.

MR. DREWEN: In what connection? What is your Honor's specific reference?

THE COURT: Well, you're talking about a gun going into a pocket, and I immediately leaped to the conclusion that the officer decided that there was a crime being committed in his presence.

MR. DREWEN: Yes.

THE COURT: Which meant that there was an obscene picture available, and I suggest the officer is incompetent to make that decision.

MR. DREWEN: Well, he is not incompetent to make the decision when he acts upon his own judgment which is the only thing that he can do under the circumstances.

THE COURT: But Marcus against the Search Warrants and Lee Art Theater against Virginia say that that cannot be done.

MR. DREWEN: But what those cases say is that it cannot be done, but in this case it would not have been done if

this proceeding had not interfered with the proceedings before the magistrate. Nobody was arrested here. A warrant was served—a summons, rather, was served, of these proceedings before the magistrate two or three days hence for the purpose of determining the question that is now before this court.

THE COURT: The Supreme Court says that's too long to wait.

MR. DREWEN: I don't know of any case that says that two days is too long to wait.

THE COURT: You said three before.

MR. DREWEN: Pardon?

THE COURT: You said three. Fifty-eight hours was held to be too long in one case.

MR. DREWEN: Well, this is 48 hours.

THE COURT: Oh, I misunderstood you. I thought you said 72.

MR. DREWEN: No. We're within the—

THE COURT: Well, as you said, the other cases are irrelevant. We're only interested in this one.

MR. DREWEN: The question of returning the print, of course, begs the question, because if this is obscene there is no obligation to return it.

I have nothing further to say, your Honor.

THE COURT: What do you suppose the Supreme Court means when it says that material cannot be proscribed unless it is found to be utterly without redeeming social value?

MR. DREWEN: Is your Honor asking me a question?

THE COURT: Yes. What do you suppose they mean? Utterly without redeeming social value.

MR. DREWEN: I suppose they mean what they say.

THE COURT: I suppose so too. But what do you suppose they mean?

MR. DREWEN: All you want me to do is to supply a different set of words to take the place of those that you've just uttered by the way of quoting the court.

Utterly means completely. And redeeming is to save. Social value is a very vague term that I can't begin to deal with on this occasion, exhaustively.

THE COURT: All right. Suppose I were to tell you of a motion picture which opens up—you may be seated—with a shot of some city or wharf town in Italy, shows a young lady finally come out of a store, and she is generously endowed, although not overgenerously—

MR. DREWEN: Endowed with what?

THE COURT: Everything that a young lady should have—which is, after all, part of creation.

MR. DREWEN: That includes virginity, doesn't it?

THE COURT: I'm not so sure that's good, Judge Drewen, but we won't pass on that.

You may be seated.

MR. DREWEN: Thank you.

THE COURT: This young lady, her first act after greeting a number of people—and is obviously quite well-known—is to pick up an apple from a stand.

Oh, before that, there was a little scene in which some young gentleman came up and took a red bolt of cloth and put it over her to see how it would look on her. In the

course of straightening it out, ran his hand over her left breast. And her retort to that was that "you're trying to get something for nothing."

She then went to the fruit stand and she was apprehended by a young police officer, only to find out to his chagrin that when she stole enough the suggestion was that the fruit stand operator took out in trade for the value of what she had stolen.

Thereafter she gets into an imbroglio with another coworker, and she succeeds in stabbing her in the face because the individual suggests that when she performs her tasks, she, Carmen, she leaves a souvenir with her customer, which I understand is one of the worst things you can say about one of those people.

MR. DREWEN: Your Honor is using figurative language, isn't he?

THE COURT: I am describing the motion picture.

MR. DREWEN: I see. In figurative language.

THE COURT: She is arrested by the same police officer who attempted to arrest her in the first instance for the apple.

Consider the symbolism of the apple, by the way.

MR. DREWEN: You shouldn't ask me to do that because I didn't know it had any symbolism.

THE COURT: Adam and Eve, I am thinking of.

He puts handcuffs on her, and while he's putting the handcuffs on her her hands are behind her back and they're near the genital area of the police officer and she succeeds in exciting him. So much so that he permits her to escape. And there is a chase and he blocks the police officers who

have come upon the scene, and she retreats to a house in which she lives, come upon a couple obviously engaged in sexual intercourse.

Thereafter we are treated to a series of events which disclose this young woman as a woman of complete worldliness.

MR. DREWEN: Complete what?

THE COURT: Worldliness. A woman who is incapable of loving any other human being. A woman who understands the functions of her body and understands the allurements that those functions have for males and the response that males will inevitably give to those functions. With this she corrupts the young police officer. She spends a night with him. And she says some significant words to the effect that "tonight we are man and wife." Which is about as near I suppose as she gets in the picture of exhibiting any emotion for another human being other than animal reaction.

After entertaining this young police officer she tosses him over. She interrupts his duties in attempting to arrest smugglers by promising him more. And when he comes to her, she gives him half of what she got for permitting the smugglers to come in, in money.

The police officer feels that he has perhaps fallen to the deep abyss and he goes to a chapel. But she shows up in the chapel, and she leads him out of there, the chapel.

The police officer then finds his senior officer has been corrupted by her, that the magistrate of the community has been corrupted by her, that the head of a parole board has been corrupted by her to the extent that he can be cor-

rupted since he is a panderer for his wife who is a lesbian. The magistrate who has been corrupted is one who leads a bacchanalian existence, in secret. She succeeds in having her husband released from jail because she has corrupted the head of the parole board and he is obviously a criminal. She uses other people in her own wife to obtain material ends, money, and finally after a series of events she meets the rock-and-roll or a folk singer, and at one point in an engagement with him she asks him, "Would you do anything for money?"

And he said, "Yes."

And she said, "Even kill?"

And he says, "Yes."

And thereby she forms probably what is the most enduring attachment that exists in the entire film, showing her complete faith in nature.

In the meantime, our young police officer has murdered his superior whom he caught in bed with Carmen, whom he loves. This is what we are to gather from the picture. He pursues her like a goat all over the place and becomes one of her criminal gang, and some of the crimes consist of being found in bed with respectable citizens, snapshots being taken, blackmail.

So finally he gets into an involvement with the husband of Carmen and kills him. And the remark is made, "You fool, why did you kill him? He would have sold her to you for ten dollars." Showing again this relationship which existed.

And she finally takes off and leaves everyone and goes with the rock-and-roll singer, and our friend who is wanted by the police officers, the police officer—a bad police

officer—comes back to the town where he had committed murder, killing his superior, and there is a scene in a cafe where the rock-and-roll singer is performing and Carmen is in the audience, and there is an attempt by this young man to gain her back, and at this point the libretto is almost identical to Bizet. She flees the tavern or nightclub, goes into the square, and we only see her from a distance; almost in silhouette; and there is this exchange; and if you heard Carmen, the "no," you can see her head move for the "no." There is no singing. There is just background music.

And our young man takes a knife and plunges it into her abdomen. And she drops in the middle of the square. And then his voice comes on the screen and it says, "Before they pick me up, I hid her body, so no one can find her."

MR. DREWEN: I can't hear that last.

THE COURT: "I hid her body, so no one could find her."

So we know at the end that his love was not love but lust.

Now, interspersed in this picture are many scenes in which sexual intercourse obviously occur, although it must be inferred, and a strong inference can be drawn. In one instance, cunnilingus. In another instance, fellation. In another instance, a lesbian encounter. But this must be inferred.

The language of the script, except for the use of the word "whore," couldn't be questioned.

At the end of the picture you are satisfied that the children of darkness indeed may enjoy the pleasures while they are here, and the big question is left as to what hap-

pens thereafter. In fact, there is a reference to St. Matthew someplace in the early part of the picture.

Now, if you want to view this picture as a series of bedroom scenes without what I have just described, then you're prurient. If you wanted to see this picture in light of the story line which I have just described, over-simplified, then perhaps you are looking for what the artist—and of course, as I understand it, the artist is the fellow who puts the film together—wanted to achieve. Incidentally, I don't think he did a good job. He could have done an excellent job. The photography is very good. Carmen is a —whoever she is—a good actress. The fellow who played the police officer I suppose comes through the way you want him to come through, but I think he overacted.

But does all this add up to something, when considered, that it is aimed at the prurient interest of the average member of our society considering contemporary community standards and that it is utterly without redeeming social value?

I suppose that if Carmen had been permitted to slay the police officer and go on her way, there would have been a perversion of moral values and we would have had a theological problem. But she wasn't. The artist had her pay her due, at the hands of the one person she couldn't shake; the one who tried to tie a relationship to her, albeit an inferior one, not a spiritual relationship; one based purely on matter, purely on sex. Although he didn't realize it until he unconsciously spoke as the picture indicated at the end.

Now, that's the movie I saw last night. When I look at it that way, I have to start quibbling with the artist. And that's why I mentioned the problem of art and prudence.

Sure, the artist owes an obligation to society when he creates a work of art to be prudent. Prudent not to scandalize. I'm talking in the field of aesthetics now. And aesthetics is nothing more than an attempted answer to the old maxim: de gustibus non disputandum est.

But in being prudent he must not prostitute his art, because in presenting life or existence he must present it as it is. With all its glories and with all its tawdriness. With all its beauty and with all its ugliness. With all its spirituality and with all its base material.

So his problem is a grave one, and while the critic may quibble with him, I have grave reservations as to whether the law can.

MR. DREWEN: Whether the what?

THE COURT: "Law can."

We have imposed upon us by the Supreme Court of the United States a standard to judge obscenity. I don't have too much difficulty with it.

Our language, our English language is an unfortunate language in that we do not have precise words such as the ancient Greeks had, for example. And in communicating, using the words of our language, sometimes we use words which mean different things to different people. But by now the standard established in Roth-Alberts by Justice Brennan, and reiterated in Memoirs versus Massachusetts, should at least among lawyers have taken significant if not pretty rigid meaning.

We find I think the real meaning of this definition only by looking at the material or subject matter of the cases which the Supreme Court has decided and to which it has applied this standard.

When I look at this film and I look at this test, whether the elements coalesce or not, it seems to me, one, that the dominant theme of this movie taken as a whole is not to a person of average intelligence merely one to appeal to the prurient interest of the members of society. It can. But there are individuals who can get awfully excited at a pencil. There are people who collect shoes, because they get sexual satisfaction from it.

What we are talking about is the "normal" member of society.

Secondly, is the material patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters? I am sure that no one would go to that picture or no one will learn anything new. There is nothing in that picture that actually portrays the sexual act. You must infer it. The only genitals that are seen are those of a male, and they're on a statue, and you can see those in the Vatican, Judge Drewen.

And the third test is whether it's utterly without redeeming social value. My reaction to the picture was the utter horror that an individual, a human being, a creature, could have sunk to such baseness without the suggestion that there was something wrong mentally; and, of course, this was a work of art. It wasn't life. And while it tried to portray life, the way this artist saw life, was through this woman, in this kind of a situation

The picture is not obscene, within the legal sense. If there are people who would be disturbed by something like this, they shouldn't go. If they think they would be disturbed by it, they shouldn't go. But that's not a reason to close it. There are people who may want to see it and may want to see it because they believe it is part of the contemporary expression shown in the art of motion pictures.

This individual who put this film together, one criticism, I think he did draw out some of the engagements, for want of a better term. I think it prostituted his art. I think it would have been a better picture if there had been more suggestiveness rather than more off-the-wall photography, as it were. Although I think, quite frankly, to have done it the way I think it should have been done perhaps would have made it more objectionable to some people, because it would have left the appetite hungry rather than to have oversated it. But, again, that's a problem for the artist, one of mechanics, and not one for the court.

This is a First Amendment problem, and I know of no judge in our system who thinks of any principle of law beyond this one with more reverence. We are what we are because of the First Amendment of the United States, and I'm referring to this country. Sure, there may be lots of things that people can criticize us for, but just remember, we can stand up and criticize ourselves and criticize everyone else for the same thing and attempt to do something about it, because we have the right of expression. And the day that we start to curtail it, I'm moving. And I'm sure you'll be along with me, Judge Drewen.

Mr. Monigan, you may prepare a final judgment.

MR. MONIGAN: Thank you, your Honor.

THE COURT: Incorporating the determination which I have made and enjoining the City from interfering with the exhibition of this picture.

MR. MONIGAN: Thank you, your Honor.

MR. DREWEN: Before you Honor rises, might I have a word with my associate?

THE COURT: Sure.

MR. MONIGAN: May I have P-1 back, your Honor?

THE COURT: Sure.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, HUDSON COUNTY
DOCKET NO.

VAN CURLER BROADCASTING CORP.,
*Plaintiff,*

v.

WILLIAM MUSTO, et al,
*Defendants.*

I certify the foregoing to be a true and accurate transcript of the proceedings in the above-entitled cause.

/s/ SAMUEL VANDER VALK
Official Court Reporter

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

| | |
|---|---|
| STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.* | No. 3123 MOTION TO SUPPRESS EVIDENCE AND DISMISS CHARGE |

Comes now the defendant, William Rabe, by and through his attorneys, Critchlow, Williams, Ryals & Schuster, and moves the court for an order suppressing as evidence the film "Carmen Baby" on the grounds that said evidence was illegally seized and further moves that the charge against the defendant be dismissed.

Dated this 8 day of November, 1968.

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
Of Attorneys for Defendant

By: /s/ REMBERT RYALS

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
COUNTY OF BENTON

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|---|---|
| STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.* | No. 3123<br>ORAL OPINION DENYING MOTION TO SUPPRESS<br>November 21, 1968 |

[Tr. 2-5]

THE COURT: State vs. Rabe.

MR. RYALS: This matter comes on upon the defendant's motion to suppress the evidence which was seized in this case, namely the film, Carmen Baby.

(Mr. Ryals argued to the court in behalf of the defendant. Mr. Ludwig argued in behalf of the State, after which Mr. Ryals argued in rebuttal.)

THE COURT: In regard to a motion for change of venue, I did have occasion to read this whole file, but I did not have the opportunity to read the cases cited in the brief, so I am ill-prepared at this moment to analyze the Metzger decision or others and, of course, that would be appropriate to a knowledgeable decision.

I am following the practice, to keep things moving, however, of—this has a trial date?

MR. LUDWIG: December 30.

THE COURT: Well, if I take it under advisement and on December 15th I announce that it is my conclusion that this matter should proceed on for trial, that the motion

should be denied, then counsel has been lulled into a situation of not preparing for a trial on the 30th, and I am inclined not to do that.

So I prefer, in a rather high handed and curbstone fashion, to deny the motion and advise both counsel that in the interim, I will review the briefs and if my decision is reversed by consideration of the cases, I will advise counsel to renote the motion for further consideration.

But in the meantime, I will deny your motion simply to keep the matter moving.

• • •

Now, the other thing that occurred to me during your argument, your argument sounds valid to me in regard to having knowledge of the overall nature of the film being displayed rather than specific scenes but, you see, where the question of whether this is an indoor or outdoor movie would come up, in my judgment, is that the position taken by Judge Yencopal as a trier of the fact was that short excerpts of this film would be viewed by families passing, I assume, on the highway, in regard to the matters displayed, so in this case, uniquely enough, I suppose that Judge Yencopal would have been permitted to consider isolated pieces of the film whereas that would not be true if the film was displayed in an indoor theater.

• • •

I am going to deny your motion and I will review your briefs and read the cases cited and if I feel inclined to reverse my ruling, I will advise counsel.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

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| STATE OF WASHINGTON, *Plaintiff*, v. WILLIAM RABE, *Defendant*. | No. 3123 EXCERPTS FROM TRIAL TRANSCRIPT April 2, 1969 and April 24, 1969 |

No. 3123

EXCERPTS FROM TRIAL TRANSCRIPT

November 21, 1968 *et seq.*

[Tr. 9-10]

MR. RYALS: If a court can issue a warrant based on testimony by a police officer describing two scenes, presumably of three or four or five minutes length, out of a film which runs an hour and a half, I submit to you, Judge that there is probably no movie, certainly no movie that is getting what we call now an "M" rating, that would be safe, because movies such as The Fox described and showed scenes between two women making love, and showed a scene between a man and a woman making love without any clothes. These scenes in context were not offensive, and I don't think the movie has even been tested. I don't think anybody seriously has questioned it. So how can the hearing held before the judge in this case have focused searchingly on the question of obscenity?

These are not just words, because the Court has said that these publications are entitled to the highest protection before they are seized. This movie has now been

seized for six months or more. It has been out of circulation. So I would like to renew that motion at this time.

• • •

[Tr. 13]

"MR. RYALS: . . . Again, when you view the film I think you should keep in mind, in accordance with Jacobellis, it is the adult population, and if the legislature wants to decide differently the legislature may do so.

"We will present testimony from a broad cross-section of the community indicating their opinion as experts. We will have a person from Columbia Basin College, we will have others who are citizens, we will have people who are familiar with the opera Carmen.

"Has the court been furnished with the memorandum decisions of the other two trial courts that have examined this?

"THE COURT: Yes. I have read them.

"MR. RYALS: We will have testimony indicating that certainly no matter how you stretch it this film is not obscene, applying the present standards promulgated by the Supreme Court, which this court, of course, is bound to apply."

• • •

[Tr. 23]

[Objecting to an offer of the film into evidence]:

MR. RYALS: For the record, we would object in view of the fact that the warrant and seizure were not proper under the constitutional safeguards provided the defendant.

• • •

[Tr. 73]

"MR. RYALS: Your Honor, at this time, although I

think the motion should be granted, I recognize the Court would either do so summarily or deny it summarily, and for the record I would make the motion that the State's case be dismissed.

The State has presented, in our judgment, no evidence to sustain the three-cornered burden set forth by the Supreme Court. I particularly call attention to the opinions by the previous trial courts that have heard this case, and I ask the court in examining this testimony to be mindful of the opinions set down by our Supreme Court.

I don't mean to be overly personal but I do say this, that the judges who have applied these standards have been courageous and the standards have been established whether we agree with them or not, and they are the law of the land, and I would make that motion.

I would have a lot more to say at the conclusion of the case, but I think that protects the record.

THE COURT: It will be denied. You may proceed."

• • •

[Tr. 145]

THE COURT: . . . The point I am making is that I don't believe that it is necessary for this court to reach the issue of whether the picture taken as a whole is obscene. I think this court under these peculiar circumstances must consider each portion of the picture as viewed by, I suppose, all of the families in the residential area, all of the people driving over the overpass, as short scenes, individual portions of the movie, and in looking at it on that basis I agree with Justice Bowman.

Who can say that this is not obscene? In that light there

is no plot, nothing. Just an offensive demonstration displayed to families passing in the night.

• • •

[Tr. 146-47]

MR. RYALS: I would just like to say as far as I know every statement you have made is outside the record regarding the position of the theater, and as far as I also know this decision is an absolute first across the country that because of the drive-in you might get a fleeting glimpse.

The kids, now, are there by choice. They are there and they remain there. You tell me any drive-in movie where you are driving down the highway at 60 miles an hour and you can do any more than glance.

You say the screen faces the City of Richland and almost implies that the entire populace is looking out of their window, but the statements are not supported by the record, which is all the court will have on appeal. That is number one. Number two, I can visualize a situation where this court might want a ruling on the ultimate issue of obscenity to avoid a remand, and I would request that the court make such a ruling to avoid that problem, because I don't suspect the court is going to view a movie shown at a drive-in in that light, because a lot of movies, such as The Graduate, where you might see Ann Bancroft bare from the waist up, if you remember that scene from the movie, and if this is going to be the test applied by this court I think it is going to be overturned and I would like to see a ruling on the ultimate question.

• • •

[Tr. 148-49]

MR. RYALS: Let me just make one final point. Do you

know what you are saying, Judge? You are saying that no film can be shown in a drive-in movie if a single scene, no matter what context it is shown in, is offensive, and you are saying that such a film does not have to be adjudged obscene. That is a startling ruling. If that is the ruling, fine, but that is what you are saying?

THE COURT: You missed the point.

MR. RYALS: I must have.

THE COURT: If the drive-in movie faces a residential area and if the screen is not blocked off from the view of those people, then I suggest that each scene is a separate movie and you must consider that particular scene as to whether the movie is obscene.

• • •

[Tr. 164-65]

MR. RYALS: . . . I would also say that you have announced a decision that is a first in the country and it seems to me not fair to penalize Mr. Rabe for not having anticipated that decision. He announced to this court that normally they get caveats from the distributors and he follows those in his advertising. The prosecutor has put on no testimony there was any pandering involved in the advertising.

• • •

[Tr. 165]

THE COURT: It is just a figure that the court has to arrive at to perhaps persuade others that it isn't a financially successful venture to sell this type of film.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

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|---|---|
| STATE OF WASHINGTON, *Respondent,* v. WILLIAM RABE, *Appellant.* | No. 3123 NOTICE OF APPEAL |

TO: THE STATE OF WASHINGTON, Plaintiff, and
TO: CURTIS LUDWIG, Its Attorney

YOU AND EACH OF YOU will please take notice that William Rabe, the defendant above named, hereby appeals to the Supreme Court of the State of Washington from each and every part of the Judgment entered in the above-entitled Court on the 19th day of September, 1969, whereby the defendant was found guilty of a violation of RCW 9.68.010, to-wit, the crime of obscenity and was punished by being fined the sum of Six Hundred ($600.00) Dollars, and being required to pay the costs of this prosecution as the same may be taxed. The defendant is not now in custody.

DATED: This 3 day of October, 1969.

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
Of Attorneys for Defendant

By: /s/ REMBERT RYALS
REMBERT RYALS

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.* | No. 41365 EXCERPTS FROM APPELLANT'S OPENING BRIEF |

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## ASSIGNMENTS OF ERROR

1. The Court erred in denying the defendant's motion to suppress as evidence the film Carmen Baby.

2. The Court erred in entering Findings of Fact II, III, and IV, and Conclusions of Law II and III reading as follows:

### Findings of Fact

II

That said Park-Y Drive-In Theatre faces a residential area of the City of Richland and an overpass providing a clear view of the screen to residents of the area and passing motorists.

III

That individual portions or scenes of the movie have a dominant theme which appeals to a prurient interest in sex, is patently offensive because it confronts contemporary community standards relating to the representation of sexual matters and is utterly without redeeming social value.

IV

That passing motorists and residents outside the theatre are in a position to see only individual portions or scenes of the movie.

**Conclusions of Law**

II

Individual portions or scenes of the movie "Carmen Baby" are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves.

III

That the defendant, William Rabe, is guilty of exhibiting an obscene movie and judgment and sentence should be entered accordingly.

3. The Court erred in entering Judgment finding the defendant guilty of the crime of obscenity and punishing him accordingly. (Br. 8-9)

• • •

It is undisputed that in the instant case no adversary proceeding was held before the film, "Carmen Baby," was seized. Further, the hearing held prior to seizure did not "focus searchingly on the question of obscenity." The officer described two scenes from the film. He gave no testimony concerning its length or dominant theme. Thus, there was no way for the Judge to know whether there was probable cause to believe the film was obscene. This will be more apparent after an examination of those cases which consider the question of obscenity, some of which are discussed below. (Br. 12)

• • •

In the case at bar there is no evidence or any suggestion that the defendant was guilty of pandering in the manner in which he advertised the film for showing. Rather the record is totally devoid of any testimony that the advertising was salacious.

The trial Judge refused to determine whether the film

taken as a whole was legally obscene. Rather, he elected to declare that because the film was shown in an outdoor theatre each of its scenes must be examined independently. As far as the defendant has been able to ascertain this decision represents a total departure from the rationale of the cases heretofore decided. It should be noted that the Legislature has not passed any law placing drive-in movies in a separate category nor has any law been enacted directed specifically to minors. Therefore, the case of *Jacobellis v. Ohio*, 378 US 184 is worthy of consideration. (Br. 13-14)

• • •

In view of the above decisions the trial court erred in deciding that a movie shown at a drive-in theatre must be dissected and examined after this dissection is complete in order to determine whether it is legally obscene. This same rationale could well be applied to books which are exhibited for both adults and minors to purchase and parts of which may be read by the general public without a reading of the total publication. Film producers and authors would be impossibly handicapped if segments of their works were considered completely out of context by the reviewing courts. It should again be emphasized that the Washington State Legislature has not seen fit to distinguish between age groups of our population or between the manner in which a film is exhibited. It is common knowledge that the screens of many if not most drive-in theatres are viewable from outside the confines of the theatre. Thus, if the trial court is correct most drive-in theatres would be subjected to tests totally dissimilar to those applied to other theatres. This "isolated parts" test has been heretofore completely rejected. *Roth v. United States*, 354 US 476: . . . (Br. 15)

• • •

. The defendant' witnesses were unanimous in their opinion that the film was not legally obscene. Some of these based their opinion on the fact that its dominant theme did not appeal primarily to a prurient interest and others felt that it was not patently offensive or that it did not offend contemporary community standards. To ignore the testimony of these witnesses would be to examine the film in a vacuum. (Br. 17)

• • •

Clearly the film Carmen Baby is not within the scope of the term obscenity as this term has been defined and explained by the courts. (Br. 18)